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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JOSEPH G. CHESTER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual who suffers personal injuries as the result of the government's negligence during an air show open to the public can sue the United States of America despite state law immunity for recreational use of land when both monetary and non-monetary consideration is received.

2. Whether direct mailers, invitation-only shows and extensive marketing of an air show causes the United States of America to lose its immunity for negligently caused injuries on its property under the express invitation exception to recreational use immunity.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AUTHORITY INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

A.J. Industries, Inc. v. Ver Halen, 75 Cal.App.3d 751 (1977) 8

Borgnis v. California-Oregon Power Co., 84 Cal.App. 465, 258 P. 394 (1927) 10

Coryell v. U.S., 855 F.Supp. 1120 (C.D. Cal. 1994) 9

Ducey v. United States, 713 F.2d 504 (9th Cir. 1983) 9

O'Keefe v. South End Rowing Club, 64 Cal.2d 729, 414 P.2d 830 (1966) 10

Ornelas v. Randolph, 4 Cal.4th 1095 (1993) 6, 7, 8

Johnson v. Unocal, 21 Cal.App.4th 310 (1993) 8

STATUTES AND RULES

California Civil Code Section 846 ..... 2, 6, 8

28 U.S.C. Section 1254(1) 1

28 U.S.C. Section 1291 6

28 U.S.C. Section 2671 3

28 U.S.C. Section 2674 3

28 U.S.C. Section 1346(b) 3

PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph G. Chester ("Chester") requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on August 15, 1996, which affirmed a final judgment of the United States District Court for the Southern District of California.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Petitioner's Appendix A and is unpublished. The district court's judgment appears at Petitioner's Appendix B. The order of the district court appears at Petitioner's Appendix C.

JURISDICTION

On August 15, 1996, the United States Court of Appeals for the Ninth Circuit filed its decision upholding the district court's granting of defendant's cross-motion for summary judgment. (Pet.App. A)

This Court has jurisdiction over this matter pursuant to 28 U.S.C. section 1254(1).

STATUTORY AUTHORITY INVOLVED

California Civil Code section 846 provides in pertinent part as follows:

> "An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section. A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.
>
> An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

> This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.
>
> Nothing in this section creates a duty of care or ground of liability for injury to person or property."

The Federal Tort Claims Act, 28 U.S.C. section 2674, provides in pertinent part as follows:

> The U.S. shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

STATEMENT OF THE CASE

Statement of the Facts. Plaintiff-Petitioner Joseph G. Chester ("Chester") was injured while attending the annual air show at Miramar Naval Air Station. When Chester sued, the jurisdiction of the district court was invoked under the Federal Tort Claims Act, 28 U.S.C. section 2671, et seq., and under 28 U.S.C. section 1346(b).

In addition to being an educational and public relations event, the Miramar air show has generated on average almost $1.5 million annually in gross profits and $500,000 in net profits each year. The Navy's Morale, Welfare and Recreation Department ("MWR"), an instrumentality of the United States, is a major beneficiary of the profits generated by the air show. MWR is heavily involved in advertising and promoting the air show, as well as administering civilian performer contracts, concessionaire contracts, special seating, corporate sponsorships, and novelty booths, among other things. Thirty or more command departments at Miramar collectively work with MWR to plan and carry out the event.

The United States stages the air shows (which they describe as "Another Revenue Generating Activity") for the express purpose of assisting recruiting efforts, promoting esprit de corps, and improving community relations.

Although Navy regulations prohibit the charging of a fee for parking or admission to the air station, the various types of seating for which a charge is made is heavily promoted as a profit-making aspect of the air show. In addition to paid seating and corporate sponsorships, substantial funds are raised by the sale of souvenirs, food and beverages during the air show.

The advertising of the air show has become increasingly sophisticated and aggressive during the last five years. In addition to the traditional billboards along nearby freeways, newspaper advertising and direct mailers encouraging advance purchase of reserved box

seating are used. MWR maintains mailing lists from previous years' attendance. MWR also started issuing direct invitations to previous attendees, providing them with the opportunity to order paid seating by mail or through Ticketmaster at a cost of up to $50.00 per ticket.

Specific groups were targeted for special "invitation only" shows the Friday before the weekend shows. Chester was attending an "invitation-only" show when he was injured. Chester and his two children attended the air show with Mrs. Webster and her children. Mrs. Webster's husband, John Webster, was a captain and medical doctor in the United States Navy. The two families sat in paid seating known as "box seats."

Chester was injured on a portable hydraulic stairway which provided access to static displays of military airplanes and tanks during the air show. While reaching out for his son, he fell through a large gap between two of the steps. His leg was lodged between the steps by the weight of his body. Rescue efforts increased the damage when the stairway was inadvertently closed on his knee. As a result of his injuries, forty-four year old Chester is now permanently disabled.

The Proceedings Below. Chester filed suit against the United States of America under the Federal Tort Claims Act for the injuries to his knee which resulted in permanent disability, numerous surgeries, and loss of his electrician's business.

On cross-motions for summary judgment, the district court held that none of the exceptions to immunity under California Civil Code section 846 apply in this case,

including the consideration and express invitation exceptions. (Pet.App. C)

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked under 28 U.S.C. section 1291. The Ninth Circuit affirmed. The court held that the payment for special seating, refreshments and a program were not adequate consideration under California Civil Code section 846. (Pet.App. A-2) The court held that viewing the static displays was not an implied benefit of the special seating. *Ibid.* On the issue of consideration, the court also determined that the air show's benefits of improved community relations, recruitment, and csprit de corps do not constitute consideration under section 846. (Pet.App. A-3)

On the issue of express invitation, the Ninth Circuit ruled that the government's promotion of the air show through newspaper advertisements, freeway billboards and direct mailings did not invoke the express invitation exception to immunity. (Pet.App. A-4) Because the government did not extend a direct, personal request to Chester to attend the event, the court concluded the express invitation exception did not apply. *Ibid.*

REASONS FOR GRANTING THE WRIT

The California Supreme Court has interpreted the purpose of its recreational use legislation as an effort to encourage private landowners to open their land to the public without fear of incurring liability. In *Ornelas v. Randolph*, 4 Cal.4th 1095 (1993), the court described as the target of the statute, the landowner who makes his land

available to the "uninvited, nonpaying recreational user." *Ornelas v. Randolph, supra,* 4 Cal.4th at p. 1100. The Ninth Circuit Court of Appeals has in[illegible]rpreted the immunity statutes in a manner which is in conflict with the principle of law stated by California's highest court.

The importance of clarifying the confusing and differing judicial responses to the question of immunity is demonstrated by the large number of persons potentially affected. Public air shows on government land have been held for over forty years and continue to be held at a number of locations many times each year. Thousands of people attend the shows.

In addition to air shows, increasing numbers of people are using government-owned land for recreational purposes. Although in many instances a direct entrance fee is not charged, the government is profiting from the presence of recreational users through other fees charged for use of its land. The government is also becoming increasingly aggressive in marketing the opportunities for recreational use on its land in an effort to increase revenues.

The Ninth Circuit's overly-restrictive interpretation of the recreational use statutes results in creating immunities where none were intended. When a recreational user is injured by the government's negligence, but cannot recover from the responsible party, the end result is that members of the public subsidize what properly should be the government's cost of engaging in a commercial enterprise.

I.

Where The Landowner Profits From The Public's Use Of Its Land, Immunity Is Both Unnecessary And Improper.

Under the recreational use statute, private landowners are given limited immunity when they allow nonpaying, uninvited members of the public to use their land for recreational purposes. California Civil Code section 846. California's highest court describes the target of the statute as the "uninvited" and "nonpaying" recreational user. *Ornelas v. Randolph, supra,* 4 Cal.4th at p. 1100.

Immunity is lost, however, if consideration is paid to the landowner for permission to enter the land for recreational purposes or where consideration has been received from others. The consideration exception has been interpreted as not being limited solely to the direct payment of entrance fees. *Johnson v. Unocal,* 21 Cal.App.4th 310, 316 (1993). Consideration is defined as, "a present, actual 'benefit bestowed or a detriment suffered'." *Ibid.* See also, *A.J. Industries, Inc. v. Ver Halen,* 75 Cal.App.3d 751, 761 (1977).

The United States stages air shows not primarily for free recreational purposes, but for the profits they generate and for such non-monetary benefits as recruitment and retention of military members. The air shows are huge commercial enterprises which generate both monetary benefits directly to government employees and equally valuable non-monetary benefits such as recruitment and retention.

A clear line was drawn when limited immunity was bestowed to encourage the generosity of private landowners in making their land available to the public. But, where there is a potential for and intention to make a profit, tort immunity is not necessary or proper to encourage landowners to open up their property. *Ducey v. United States*, 713 F.2d 504, 510 (9th Cir. 1983). The immunity statute was not intended to provide protection to landowners who open their land primarily for profit.

The Ninth Circuit Court of Appeals' decision, which perpetuates immunity, is inconsistent with the stated purpose of the recreational use statute and wrongly deprives injured members of the public of the ability to recover for their injuries. The purpose of the recreational use legislation is defeated, and an innocent victim is left uncompensated and without a remedy, if the Ninth Circuit's interpretation of the consideration exception is allowed to stand.

II.

The Government's Personal Selection Of Invitees Invokes The Express Invitation Exception To Immunity.

Landowners are not immune from liability to persons who are expressly invited, rather than merely permitted to enter the land. The term "express" means, "explicit, non-implied, specific, definite, exact, and made for or suited to a special purpose or event." *Coryell v. U.S.*, 855 F.Supp. 1120 (C.D. Cal. 1994). It is difficult to imagine a more express invitation than the United States' invitations to special groups to attend an "invitation-only" show, direct mailers to specifically targeted persons

exhorting them to attend and to purchase paid seating, and freeway billboard advertising of the show.

Despite the fact that Chester was at an "invitation-only" show when he was injured, the Ninth Circuit held the express invitation exception did not apply because the government did not extend a direct, personal request to Chester to attend the event. (Pet.App. A-4) The circuit court further ruled that direct mailings, advertisements and freeway billboards did not invoke the express invitation exception. *Ibid.*

California courts have interpreted the term "expressly invited" to include an invitation made to the general public. *See, O'Keefe v. South End Rowing Club,* 64 Cal.2d 729, 414 P.2d 830 (1966), *citing Borgnis v. California-Oregon Power Co.,* 84 Cal.App. 465, 258 P. 394 (1927). Furthermore, the clear language of the statute defeats the Ninth Circuit's overly restrictive interpretation of the express invitation exception to immunity.

MWR spends thousands of dollars on advertising the air show, invites the purchase of paid seating, and invites persons and groups to attend shows intended only for those specifically invited. These activities put the government in a position far different than the landowner who merely passively tolerates the presence of members of the public on his or her land. The government's use of its land for air shows is a far cry from what the Legislature intended to protect with the recreational use statute.

CONCLUSION

Certiorari should be granted to resolve the conflict with California law and to allow innocent victims of government negligence a remedy for their injuries.

Respectfully submitted,

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INDEX TO APPENDICES

		Pages
APPENDIX A	United States Court of Appeals For the Ninth Circuit Memorandum Decision	App. 1
APPENDIX B	Judgment of the United States District Court, Southern District of California	App. 5
APPENDIX C	Order of the United States District Court, Southern District of California	App. 6

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH G. CHESTER, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	NO. 95-55821 DC NO. CV-92-01834-EJS MEMORANDUM* (Filed Aug. 15, 1996)

Appeal from the United States District Court
for the Southern District of California
Edward J. Schwartz, District Judge, Presiding

Argued and Submitted August 7, 1996
Pasadena, California

Before: D.W. NELSON, T.G. NELSON, and THOMAS, Circuit Judges.

Appellant Joseph G. Chester was injured while viewing a static display of a military tank at the 1991 Air Show at Miramar Naval Air Station. Alleging negligence, Chester brought an action against the government under 28 U.S.C. § 2671 (Federal Tort Claims Act). Holding that the government was immune from liability for personal

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

injury under California's Recreational Use Immunity statute, Cal. Civ. Code § 846, the district court granted summary judgment in favor of the government. On appeal, Chester contends that the district court erred in granting the government immunity because the consideration and express invitee exceptions to immunity under § 846(b)(c) apply to this case. We affirm.

Under § 846, a property owner owes no duty of care to keep the premises safe for entry or use by others for a recreational purpose. However, under § 846(b), an exception to immunity exists "for injury suffered in any case where *permission to enter for the above [recreational] purpose was granted for consideration* other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose." (emphasis added)

An actual payment of an entry fee qualifies as adequate consideration under § 846. *Thompson v. U.S.*, 592 F.2d 1104, 1108 (9th Cir. 1979). Chester, however, did not pay any fee to gain entry to the Air Show. Neither his ticket for special box seating nor his payment for refreshments and a program were adequate consideration under § 846.

In *Graves v. United States Coast Guard*, 692 F.2d 71, 72 (9th Cir. 1982), the court held that access to a river and cabana was an "implied benefit" of payment of a fee for camping near the river. Applying § 846, the court held that the camping fee constituted sufficient consideration, thereby nullifying immunity. *Id.* However, in this case, Chester's special box seating did not afford him greater or improved access to the static displays of military

equipment than those who had not paid for special seating. Viewing the static displays was therefore not an implied benefit of the special seating.

Neither *Ducey v. U.S.*, 713 F.2d 504 (9th Cir. 1983) nor *Jones v. U.S.*, 693 F.2d 1299 (9th Cir. 1982) are binding authority in this case due to significant differences in the wording of the statutes. While § 846 states that immunity is destroyed where *permission to enter* for a recreational purpose is granted for consideration, the Nevada recreational use statute at issue in *Ducey* is worded more broadly and states that immunity is destroyed where *permission to participate in a recreational activity* is granted for consideration. The Washington recreational use statute in *Jones* did not even grant exceptions to immunity using the term "consideration" and, instead, specifically stated that immunity was destroyed only if a "fee" was charged for the use of the land.

Both the Ninth Circuit and the California appellate court have defined consideration narrowly under § 846. Public relations benefits, for example, do not constitute adequate consideration under § 846. *Mansion v. U.S.*, 945 F.2d 1115, 1118 (9th Cir. 1991). Consideration must be "a present, actual benefit." *Johnson v. Unocal Corp.*, 21 Cal.App.4th 310, 316 (1993). We therefore reject Chester's contention that the Air Show's benefits of improved community relations, recruitment, and esprit de corps constitute consideration under § 846.

In addition to § 846's consideration exception, under § 846(c), an exception to immunity from liability also exists "to any persons who are *expressly invited* rather than merely permitted to come upon the premises by the

landowner." (emphasis added) Both the Ninth Circuit and the California appellate court have held that an invitation which is not a direct, personal request to attend the event does not qualify as an express invitation under § 846. *Ravell v. United States*, 22 F.3d 960, 963 (9th Cir. 1994), *Johnson v. Unocal Corp.*, 21 Cal.App.4th 310, 317 (1993).

Despite the government's promotion of the Air Show through newspaper advertisements, freeway billboards and direct mailings, the express invitation exception to § 846 does not apply to this case. Chester received no mail regarding the Air Show, and no invitation was ever mailed to him. There was no direct, personal request to Chester from the government to attend the event. The district court correctly concluded that the express invitee exception to § 846 did not apply to this case.

Therefore, the district court did not err in granting summary judgment in favor of the government because the exceptions to immunity under § 846 do not apply to this case.

AFFIRMED.

APPENDIX B

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

JOSEPH G. CHESTER

V.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

(Filed Apr. 21, 1995)

CASE NUMBER: 92-1834-S (BTM)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Cross-Motion for Summary Judgment is granted.

April 21, 1995
Date

Roberta Westdal
Clerk

/s/ B. Khaleghi
B. Khaleghi
(By) Deputy Clerk

ENTERED ON April 21, 1995

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSEPH G. CHESTER, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 92-1834-S (BTM) ORDER (Filed Apr. 5, 1995)

The hearing on plaintiff's Motion for Summary Judgment and defendant's Cross-Motion for Summary Judgment came before the court on March 20, 1995, at 10:30 A.M. Ernest M. Gross appeared on behalf of plaintiff, Joseph G. Chester, and Tom Stahl appeared on behalf of defendant, the United States.

The court has considered plaintiff's motion, defendant's cross-motion, both parties' opposition, reply, and supporting documents, the documents on file in this case, and the oral arguments of counsel.

Under California Civil Code § 846, the United States is immune from liability for injuries suffered by plaintiff, a member of the general public, who entered the Miramar Naval Air Station for the recreational purpose of viewing the 1991 Air Show. Contrary to plaintiff's assertions, none of the exceptions to immunity under California Civil Code § 846 applies to defendant in the instant case. First, defendant did not receive consideration to permit plaintiff to enter the Miramar Naval Air Station to view the 1991 Air Show. *See Johnson v. Unocal Corp.*, 21 Cal.App.4th

310, 315-16 (1993). Second, defendant did not expressly invite plaintiff to attend the 1991 Air Show. *See Ravell v. United States*, 22 F.3d 960, 962-63 (9th Cir. 1994); *Phillips v. United States*, 590 F.2d 297, 299-300 (9th Cir. 1979).

Good cause appearing and upon a review of the record, the court hereby denies plaintiff's Motion for Summary Judgment and grants defendant's Cross-Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: April 4, 1995

/s/ Edward J. Schwartz
EDWARD J. SCHWARTZ, Judge
United States District Court

Copies to all parties and Magistrate Judge